

CARLSON, GASKEY & OLDS

A PROFESSIONAL CORPORATION

David L. Atallah
Todd W. Barrett
Timothy C. Bradley
Stephen A. Burch
Karin H. Butchko
John E. Carlson
Anthony P. Cho
Benjamin J. Coon
David J. Gaskey
William S. Gottschalk
Quincy J. Harrison

400 WEST MAPLE ROAD
SUITE 350
BIRMINGHAM, MI 48009

Telephone 248.988.8360
Facsimile 248.988.8363

Matthew L. Koziarz
Kerrie A. Laba
Timothy J. Murphy
Theodore W. Olds, III
Laura E. Parker
Stephen A. Sequin
John M. Siragusa
Steven Susser
Alex Szyba
Brian S. Tobin
Jessica Zilberberg

November 1, 2019

Peter R. Marksteiner
Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place N.W.
Washington, D.C. 20439

Re: *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-1584 (Fed. Cir.)

Dear Mr. Marksteiner:

Pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28(i), Appellant Arthrex, Inc. (“Appellant”) writes to inform the Court of the supplemental authority of *Arthrex, Inc. v. Smith & Nephew*, No. 2018-2140, 2019 U.S. App. LEXIS 32613 (Fed. Cir. Oct. 31, 2019).

After Appellant filed its Combined Petition for Rehearing and Rehearing *En Banc* in this case, the Federal Circuit issued its opinion in *Arthrex*. *Arthrex* addressed whether Administrative Patent Judges (“APJs”) were improperly appointed in violation of the Appointments Clause. The Court held that the structure of the PTAB was unconstitutional. *Arthrex*, 2019 U.S. App. LEXIS 32613, at *27. In order to address the constitutional infirmity, the Court severed certain statutory removal provisions for APJs. *Id.*, at *34. The Court found the constitutional challenge timely when raised on appeal, noting “The Board was not capable of correcting the constitutional infirmity... and that it was thus futile for Arthrex to have raised the challenge before the Board.” *Id.*, at *38-39.

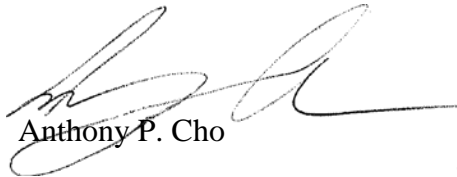
The Court held that *Arthrex* applies to “those cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal.” *Id.*, at *40. Appellant hereby raises an Appointments Clause challenge in the present appeal. The final written decision here was issued by APJs that “were not constitutionally appointed *at the time the decision was rendered*” just as in *Arthrex*. *Id.* at *36 (emphasis added). Indeed, the same three APJs from *Arthrex* issued the decision in the present case.

The *Arthrex* Court vacated the final written decision and remanded for a new hearing before a new panel because the same panel “cannot be expected to consider the matter as though [they] had not adjudicated it before.” *Id.* at *40 (citations omitted). Appellant here is entitled to the same relief, because the final written decision in the present case suffers from the same constitutional defect as in *Arthrex*.

Appellant respectfully requests that this Court vacate and remand the present appeal for a new hearing before a new panel of APJs consistent with *Arthrex*.

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Anthony P. Cho

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, which sent notification of such filing to all counsel of record as follows:

Nathan R. Speed
Michael N. Rader
Richard F. Giunta
WOLF GREENFIELD & SACKS, P.C.
600 Atlantic Avenue
Boston, MA 02210

Katherine Twomey Allen
Scott R. McIntosh
Dennis Fan
Department of Justice
Civil Division, Appellate Staff

Thomas W. Krause
Joseph Matal
Farheena Y. Rasheed
United States Patent and Trademark Office
Office of the Solicitor

Dated: November 1, 2019

/s/ Jessica Zilberberg